

PD-0395-20

NICOLE P. SELECTMAN

§

IN THE COURT OF

FILED

COURT OF CRIMINAL APPEALS

3/8/2021

DEANA WILLIAMSON, CLERK

VS.

§

CRIMINAL APPEALS

§

STATE OF TEXAS

§

OF TEXAS

**MOTION FOR LEAVE TO FILE APPELLANT'S REPLY BRIEF**

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

COMES NOW, appellant, NICOLE P. SELECTMAN, who, by and through the undersigned counsel of record, and pursuant to T.R.A.P. 70.4, does hereby respectfully move that this Court to grant appellant leave to file a reply brief in this case, and in support would show this Honorable Court the following:

**I. Guiding Legal Principles.**

After discretionary review is granted, the Texas rules of appellate procedure contemplate: (1) an "initial brief" filed by the party who lost in the court of appeals; (2) a "respondent's brief" filed by the party who prevailed in the court of appeals; (3) "other briefs" as either directed by this Court or requested "upon [a] motion by a party". Tex. R. App. P. 70.4 (West 2019).

Here, appellant filed her initial brief in this Court on January 12, 2021 and the State filed its responsive brief on February 11, 2021.

**II. Appellant Requests Leave to File a Reply to the State's Response.**

Appellant respectfully requests this Court grant her leave to reply to the State's response in a manner similar to that allowed in a court of appeals. *See* TEX. R. APP. P. 38.3 (stating, "[t]he appellant may file a reply brief addressing any matter in the appellee's brief").

Counsel was unaware separate leave from this Court was required to file such a reply. Counsel first learned this lesson when appellant's motion for extension of time to file appellant's reply was returned because that request failed to comply with Rule 70.4. Counsel appreciates the guidance provided by the clerk of this Court and meant no disrespect in not filing, at once, motions for both leave and for an extension of time to file appellant's reply here. Each of those motions will be refiled, at once, on this date, March 5, 2021.

### **III. Reasons Supporting Leave to File a Reply.**

In its responsive brief, the State demands that the discretionary review graciously allowed here be dismissed as improvidently granted. The only authority from this Court cited for this request is from 1982. *See State's Response*, p. 12 (citing *Wilhoit v. State*, 638 S.W.2d 489 (Tex. Crim. App. 1982)). The State could have made its demand in a reply to appellant's P.D.R., but elected not to do so. *See* TEX. R. APP. P. 68.8 (West 2019) (stating, "[t]he opposing party has 15 days after the timely filing of the petition in the Court of Criminal Appeals to file a reply to the petition"). Had such a PDR reply been filed, appellant could have

responded that demand in her initial brief. As it is, appellant has received no opportunity to explain why the State's request is flawed. Appellant believes the portion of *Wilhoit* the State relies upon now has either been superseded by rule, abrogated by other decisions of this Court delivered since 1982, or simply does not apply to the distinct facts of this case.

Regarding each of the three [3] substantive grounds appellant has presented, the State simply ignores factual details in the record that are inconsistent with its conclusions. Appellant submits a more full discussion of that record will emphasize and reinforce why the State's conclusions lack merit.

#### **IV. Prayer.**

WHEREFORE, PREMISES CONSIDERED, appellant hereby respectfully requests that this Court both grant leave to file appellant's reply brief in this case, and extend the time to file that reply until Monday, March 15, 2021.

Respectfully submitted,

*Dean A. Diachin*

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ATTORNEY FOR APPELLANT.

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing motion to extend time to file appellant's brief has been electronically served on the Bexar County District Attorney's Office, Appellate Division, Paul Elizondo Tower, 101 W. Nueva St., Suite 710, San Antonio, Texas 78205, on March 5, 2021.

*Dean A. Diachin*

DEAN A. DIACHIN

Bexar County Assistant Public Defender.

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